Hew Hooi Chun v KL Teksi Radio Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–433 OF 2007
SURIYADI, HASAN LAH AND JEFFREY TAN JJCA
1 MARCH 2010

Civil Procedure — Judgments and orders — Setting aside — Application to set aside summary judgment granted in absence of defendant — Earlier application to set aside summary judgment dismissed by judge and appeal against dismissal withdrawn — Second application made to another judge to declare summary judgment null and void — Whether subsequent judge correct in setting aside summary judgment ex debito justitiae

Civil Procedure — Summary judgment — Specific performance — Contract for lease of taxi with option to purchase — Whether an agreement for sale, purchase or exchange of property — Whether application for summary judgment to be made under O 14 or O 81 of the Rules of the High Court 1980

Pursuant to an agreement dated 25 Mac 1991, the defendant/respondent let and the plaintiff/appellant took on hire a motor taxi ('the said taxi'). The agreement provided that in consideration of the appellant paying a daily rental to the respondent for a specified period of time, the appellant shall become the absolute owner of the said taxi upon determination of the agreement on 28 February 1997. After the specified period, the appellant was given an option to purchase the said taxi at a nominal price. The appellant claimed for possession and title to the said taxi. On 15 May 2000, on the appellant's application, the learned SAR granted summary judgment under O 14 of the Rules of the High Court 1980 to the appellant ('the 15 May 2000 order') on the following terms: (i) a declaration that the appellant was the owner of the said taxi since 28 July 1997, (ii) an order ordering the respondent to transfer the said taxi to the appellant; and (iii) an order ordering the respondent to pay to the appellant damages to be assessed. Those orders were granted in the absence of the respondent or counsel. The respondent then applied to set aside the summary judgment but failed to do so before both learned SAR and learned judge in chambers. The respondent appealed to the Court of Appeal but later withdrew the appeal. As such, the 15 May 2000 order was final. Thereafter, on 17 October 2006, the respondent applied to have the 15 May 2000 order declared null and void and the learned JC allowed the application. The learned JC held that since the writ was indorsed with a claim for specific performance of the rental agreement, the application for summary judgment under O 14 was

defective and was in breach of O 81. Hence the 15 May 2000 order was set aside ex debito justitiae. The appellant appealed against this decision.

Held, allowing the appeal:

(1) If the action were indeed indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of property, then the appellant would have moved for summary judgment under the wrong order of court. However, the instant writ was not indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of property. The said agreement was a lease of the said taxi by the appellant from the respondent (see paras 8 & 11).

(2) Order 81 applies where the claim is for specific performance of an agreement for the sale, purchase or exchange of property, or the grant or assignment of a lease of any property. Order 81 does not apply if the claim is for specific performance of an agreement for some other obligation (see para 11).

(3) The learned JC could not have been unaware that the 15 May 2000 order which had been affirmed by a judge in chambers and then with withdrawal of the appeal to the Court of Appeal, had become final. Nevertheless, the learned JC proceeded in the same causa to nullify and set aside an order that had been affirmed by her predecessor who was a judge of coordinate jurisdiction. Although the summary judgment could have been granted under the wrong order of court, that was not to say that there was no jurisdiction to grant the summary judgment. It was just that the jurisdiction to do so was under a different order of court. It could not be put into the category of contraventions that invite setting aside ex debito justitiae (see paras 15 & 18).

[Bahasa Malaysia summary

Berikutan satu perjanjian bertarikh 25 Mac 1991, defendan/responden telah membenarkan plaintif/perayu menyewa motor teksi ('teksi tersebut'). Perjanjian tersebut memperuntukkan bahawa sebagai balasan perayu membayar sewa harian kepada responden bagi tempoh masa yang ditetapkan, perayu akan menjadi pemilik sepenuhnya teksi tersebut dengan penetapan perjanjian pada 28 Februari 1997. Selepas tempoh yang ditetapkan, perayu diberi pilihan untuk membeli teksi tersebut pada harga nominal. Perayu menuntut milikan dan hakmilik ke atas teksi tersebut. Pada 15 Mei 2000, atas permohonan perayu, PKP memberi penghakiman ringkas di bawah A 14 Kaedah-kaedah Mahkamah Tinggi 1980 kepada perayu ('perintah 15 Mei 2000') dengan syarat-syarat berikut: (i) satu deklarasi bahawa perayu adalah pemilik kepada teksi tersebut sejak 28 Julai 1997, (ii) satu perintah memerintahkan responden memindah milik teksi tersebut kepada perayu; dan (iii) satu perintah memerintahkan responden membayar kepada perayu ganti

rugi ditaksirkan. Perintah-perintah ini diberikan tanpa kehadiran responden atau peguam. Responden kemudiannya memohon mengenepikan penghakiman ringkas tersebut tetapi gagal berbuat demikian di hadapan PKP dan hakim dalam kamar. Responden merayu kepada Mahkamah Rayuan tetapi kemudiannya menarik balik rayuan tersebut. Oleh yang demikian, perintah 15 Mei 2000 adalah muktamad. Selepas itu, pada 17 Oktober 2006, responden memohon untuk mendapatkan perintah 15 Mei 2000 agar diisytiharkan sebagai batal dan tidak sah dan PK yang bijaksana membenarkan permohonan. PK yang bijaksana memutuskan bahawa memandangkan writ diendorskan dengan tuntutan bagi pelaksanaan spesifik untuk perjanjian sewaan, permohonan bagi penghakiman ringkas di bawah A 14 adalah cacat dan adalah pelanggaran A 81. Dengan itu, perintah 15 Mei 2000 diketepikan ex debito justitiae. Perayu merayu terhadap keputusan ini.

Diputuskan, membenarkan rayuan:

(1) Jika pun tindakan tersebut diendorskan dengan tuntutan bagi pelaksanaan spesifik perjanjian jual, beli atau pertukaran harta, dengan itu perayu telah memulakan penghakiman ringkas di bawah perintah mahkamah yang salah. Walau bagaimanapun, writ ini tidak diendorskan dengan tuntutan bagi pelaksanaan spesifik perjanjian jual, beli atau pertukaran harta. Perjanjian tersebut adalah pajakan teksi tersebut oleh perayu daripada responden (lihat perenggan 8 & 11).

(2) Aturan 81 terpakai di mana tuntutan bagi pelaksanaan spesifik perjanjian jual, beli atau pertukaran harta, atau pemberian atau penyerahhakkan pajakan mana-mana harta. Aturan 81 tidak terpakai jika tuntutan adalah bagi pelaksanaan sebuah perjanjian obligasi yang lain (lihat perenggan 11).

(3) PK yang bijaksana tidak mungkin tidak menyedari bahawa perintah 15 Mei 2000 yang telah disahkan oleh hakim dalam kamar dan kemudian dengan penarikan semula rayuan kepada Mahkamah Rayuan, telah muktamad. Namun begitu, PK yang bijaksana meneruskan dalam kausa untuk membatalkan dan mengenepikan satu perintah yang telah disahkan oleh pendulu baginya, seorang hakim dengan bidang kuasa yang sama. Walaupun penghakiman ringkas sepatutnya boleh diberikan di bawah perintah mahkamah yang salah, ia bukanlah mengatakan bahawa tidak terdapat bidang kuasa untuk untuk memberi penghakiman ringkas. Ia hanyalah kerana bidang kuasa untuk berbuat sedemikian adalah di bawah perintah mahkamah yang lain. Ia tidak boleh diletakkan di bawah kategori percanggahan-percanggahan yang mengundang pengenepian ex debito justitiae (lihat perenggan 15 & 18).]

Notes

For cases on setting aside, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4678–4716.

For cases on specific performance, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8287–8297.

Cases referred to

Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors [2007] 1 MLJ 225, CA (refd)

Arab Malaysian Finance Bhd v Badiaddin bin Mohd Mahidin & Anor [1996] 3 MLJ 621, CA (refd)

Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (refd)

Chief Kofi Forfie v Barima Kwabena Seifah [1958] 1 All ER 289; [1958] AC 59, PC (refd)

Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd [2003] 3 MLJ 321, CA (refd)

Hong Leong Finance Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)

Isaacs v Robertson [1984] 3 All ER 140; [1985] AC 97, PC (refd)

Lee Teng Siong v Lee Kheng Lian & Ors [2006] 5 MLJ 609, CA (refd)

MacQuire (Malaysia) Sdn Bhd v HSBC Bank Malaysia Bhd & Anor and another appeal [2007] 7 MLJ 139, CA (refd)

Meenakshi Naidoo v Subramaniya Sastri LR 14 1A 160 (refd)

Mohamed bin Othman & Anor v Abdul Shattar bin Abdul Rahim & Ors [1987] 2 MLJ 695, SC (refd)

Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Interveners) [2003] 1 MLJ 251, HC (refd)

Woodlands v Hind [1955] 2 All ER 604 (refd)

Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & ors [2000] 3 MLJ 699, CA (refd)

Legislation referred to

Malay Reservations Enactment (FMS Cap 142) s 13
Rules of the High Court 1980 O1A, O14, O14 r 1(1), O 81, O81 r 1(1),

T Gunaseelan (Gunaseelan & Associates) for the appellant.
Cheong Sek Kwan (SK Cheong) for the respondent.

Jeffrey Tan JCA:

[1] This is an appeal by the plaintiff/appellant against the order of the learned judicial commissioner (JC) dated 13 April 2007 declaring the order of the learned senior assistant registrar dated 15 May 2000 as null and void and of no effect.

[2] For the consideration set out in the agreement dated 25 March 1991 (see p 102 of the appeal record), the defendant/respondent let and the appellant took on hire a motor taxi bearing registration HW6911 (said taxi). Amongst other terms, cl 1 of the said agreement provided that the appellant shall pay a daily rental of RM38 for an initial period of 66 months and a daily rental of RM17 for the period thereafter until expiry of the taxi permit on 28 February 1997. Subject to due performance of the other terms, cl 7 provided that the appellant shall become the absolute owner of the said taxi upon determination of the agreement on 28 February 1997 (see 45AR). Clause 12 provided that upon determination of the agreement, the appellant shall have an option to purchase the said taxi at the nominal price of 1% of the residual value of the said taxi (see 45AR).

[3] The appellant's claim was for possession and title to the said taxi. On 15 May 2000, and on the application of the appellant, the learned SAR granted O 14 summary judgment to the appellant and as well struck out the respondent's counterclaim. Specifically, the learned SAR granted (i) a declaration that the appellant was the owner of the said taxi since 28 July 1997, (ii) an order ordering the respondent to transfer the said taxi to the appellant, (iii) an order ordering the respondent to pay to the appellant such damages to be assessed, and, (iv) an order striking out the respondent's counterclaim. Those orders were granted in the absence of the respondent or counsel. On 3 October 2002, the respondent applied to set aside the summary judgment. The respondent failed to do so before both learned SAR and learned judge in chambers. Against that refusal to set aside the summary judgment, the respondent appealed to the Court of Appeal. That appeal to the Court of Appeal was withdrawn (see p 46 of the appeal record). In the event, the order of the learned SAR was final. On 28 September 2005, the learned SAR awarded liquidated damages to the appellant. Against the award of damages, the respondent appealed to judge in chambers. That appeal was dismissed on 6 October 2006. Thereafter, on 17 October 2006, the respondent applied (see 34AR-35AR) to have the order of the learned SAR dated 15 May 2000 declared null and void. Then, as said, on 13 April 2007, the learned JC declared the order of the learned SAR dated 15 May 2000 as null and void and of no effect.

[4] In so far as the learned JC was concerned, 'the writ was indorsed with a claim for specific performance of the rental agreement' (see 55AR), the application for summary judgment under O 14 of the Rules of the High Court 1980 'is defective and cannot stand' (see 54AR), and the summary judgment was made without jurisdiction and in breach of O 81 (see 58AR). On the substantial merits of the claim, the learned JC held furthermore that the appellant had not exercised 'his option to purchase the said taxi in accordance with cl 12 of the rental agreement' and that the property of the said taxi remained therefore with the respondent (see 59AR).

[5] Before us, Mr T Gunaseelan for the appellant submitted that the application for summary judgment could not have been made under O 81 as the said rental agreement was not an agreement for the sale, purchase or exchange of any property, that the respondent should have proceeded with its appeal to the Court of Appeal, and that the learned JC had no jurisdiction to entertain the said summons in chambers for the said declaration.

[6] Mr Cheong Sek Kwan for the respondent contended that O 81 extends to any action with a claim for specific performance and is not confined to an action with a claim for specific performance of an agreement for the sale and purchase or exchange of property.

[7] In relation to the scope of O 81, it must be a given that it applies to all applications for summary judgment in an action begun by writ indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of land. It also applies where the subject matter of the property are shares. In *Mohamed bin Othman & Anor v Abdul Shattar bin Abdul Rahim & Ors* [1987] 2 MLJ 695, the former Supreme Court made the order in terms of the application under O 81 for specific performance of a contract for the sale of shares of a company. *Woodlands v Hind* [1955] 2 All ER 604, was another instance where the court held that the agreement either to purchase shares or to find a purchaser for those shares was an agreement for the sale or purchase of property within the former O 14A r 1(1), the equipollent provision of the present O 81. Hence, O 81 applies to all applications for summary judgment in any action begun by writ indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of property which need not necessarily be land.

[8] In the instant case, if the action were indeed indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of property, then the appellant would have moved for summary judgment under the wrong order of court. But that begs the question as to whether the instant writ were indeed indorsed with a claim for specific performance of an agreement for the sale, purchase or exchange of property. Was the agreement in question an agreement for the sale, purchase or exchange of property in the first place? All examination of the agreement revealed that it was not.

[9] The second preamble to the agreement read as follows.

> The Company have purchased vehicles more particularly described in Schedule A hereto to be used as taxis for the purpose of renting to the Driver upon the terms and conditions hereinafter mentioned.

[10] The foremost clause of the agreement read as follows.

> Now in consideration of the Driver paying the Company one lump sum of RM3,500.00 which sum is hereby known as non-refundable earnest monies, the Company will let and the Driver will take on hire upon the terms and conditions hereinafter mentioned the vehicle/taxi more particularly described in Schedule A hereto.

[11] Upon its true construction, the said agreement was a lease of the said taxi by the appellant from the respondent. The payment of daily rent totally underscored that fact. That it was a lease or rental agreement did not escape the learned JC. At p 1 of her grounds of judgment (see 42AR), the learned JC unequivocally held that the appellant was 'hirer of the taxi' that the respondent 'had let out for hire'. Even later, at p 14 of her judgment (see 55AR), the learned JC maintained that it was a 'rental agreement'. Quite clearly, the finding was that the agreement was not an agreement for the sale, purchase or exchange of property. But that finding was forgotten along the way, for in relation to the question of the applicability of O 81, the learned JC would base her conclusion on the singular finding that the claim was for specific performance. That the agreement was a lease or rental agreement rather than any agreement for the sale, purchase or exchange of property was overlooked. That, to say the least, was a serious misdirection. Order 81 r 1(1) must be read in its entirety. Order 81 applies where the claim is for specific performance of an agreement for the sale, purchase or exchange of property, or the grant or assignment of a lease of any property. Order 81 does not apply if the claim is for specific performance of an agreement for some other obligation. That was submitted, although not in those words, to the court below (see 52AR). But sad to say, that was let pass. The claim was by a taxi driver against the taxi company from whom he leased his taxi for the transfer to him of the taxi in accordance with the terms of the lease. The claim might have to import some order of specific performance, but it was of a lease or rental agreement. The agreement was not an agreement for the sale, purchase or exchange of property, and O 81, hence, had no application.

[12] There was compelling reason to allow this appeal even if it were true that the appellant had moved for summary judgment under the wrong order of court. Mr Gunaseelan submitted that the learned JC had no jurisdiction to 'entertain' the summons in chambers for the said declaration. Want of jurisdiction was also raised in the court below. The learned JC held however 'that it is within the inherent jurisdiction of this court to allow the defendant's application to set aside the summary judgment dated 15 May 2000 ex debito justitiae' (see 58AR).

[13] In reaching that conclusion, the learned JC had relied on the following two passages from the judgment of Gopal Sri Ram JCA, as he then was, in the

Federal Court case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393, which read:

> I take it to be well settled that even courts of unlimited jurisdiction have no authority to act in contravention of written law. Of course, so long as an order of a court of unlimited jurisdiction stands, irregular though it may be, it must be respected. But where an order of such a court is made in breach of statute, it is made without jurisdiction and may therefore be declared void and set aside in proceedings brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration to the effect that the order is invalid and to have it set aside. It is wrong to assume that such an order may only be corrected on appeal.
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> …
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> It is therefore clear, in light of the principles established by high authority, that a court of unlimited jurisdiction, even in the absence of an express enabling provision, has inherent power to set aside its orders made in breach of written law. The ends of justice will not be met if such a power did not exist. And the procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such a circumstance. Neither has the functus officio theory, which, upon close examination is merely part and parcel of the doctrine of res judicata, any role to play in the case.

and the following passages from the judgment of the Court of Appeal per Gopal Sri Ram JCA, as he then was, in *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609 which reads:

> The jurisdiction to enter summary judgment in cases of specific performance was conferred through an amendment to the 1957 Rules by the introduction of an O 14A. In the comprehensive procedural changes that took place in 1980, this summary jurisdiction was written into O 81 which is the current empowering provision. Take away O 81 and you cannot enter summary judgment for specific performance or rescission. Likewise with O14. Take it away and the court has no jurisdiction to enter summary judgment. I have made these points to show that O 14(1) and O 81(1) of the RHC are not merely procedural in nature. They are jurisdictional. I cannot overemphasise that absent these two rules of court there is no power in the High Court to enter summary judgment.
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> Further, O 14 in r 2(3) makes it amply clear that it is mutually exclusive from O 81. It says:
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> This Order shall not apply to an action to which O 81 applies.
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> This exclusivity is important because the jurisdiction that the court exercises under the former is distinct from the latter.
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> …
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> It follows that the court has no power to enter summary judgment either under procedure prescribed by O 14 or O 81 save in a case expressly provided for in either of these rules of court.

[14] On the authority of the aforesaid passages, it was held by the learned JC that the application for summary judgment under O 14 was a defect that was jurisdictional in nature and therefore not saved by O 1A (see 56AR), that the summary judgment was made without jurisdiction and in breach of O 81, and that therefore there was the inherent jurisdiction to set aside the summary judgment dated 15 May 2000 'ex debito justitiae' (see 58AR). As it was, the order of the learned SAR dated 15 May 2000 was declared null and void and set aside.

[15] The learned JC was aware that the order of the learned SAR had been affirmed by a judge in chambers and that the ensuing appeal to the Court of Appeal had been withdrawn (see 48AR). The learned JC could not have been unaware that the order of the learned SAR, with affirmation by a judge in chambers and then with withdrawal of the appeal to the Court of Appeal, had become final. Nevertheless, the learned JC proceeded in the same causa to nullify and set aside an order that had been affirmed by her predecessor who was a judge of coordinate jurisdiction.

[16] The gnawing question is, had the learned JC such inherent jurisdiction to set aside a final order. In *Badiaddin*, the Federal Court 'dealt with the inherent jurisdiction of the court to set aside a final order' (*Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622, per Abdul Hamid Mohamad Chief Justice). The facts there were as follows. On 21 March 1988, the High Court granted a declaration that a piece of Malay reservation land (land) had been charged in contravention of the Malay Reservations Enactment (FMS Cap 142) ('the Enactment'). On 8 October 1990, the High Court declared that the appellants had received an advantage or benefit directly from the respondent, and ordered sale of the land to settle the loan. The appellants commenced proceedings afresh to have the 8 October 1990 order declared null and void on the ground that it contravened s 13 of the Enactment. The appellants argued that they were entitled to the remedy ex debito justitiae without the need to comply with appeal procedure. The respondent argued that res judicata and estoppel precluded the appellants from questioning the validity of the 8 October 1990 order. The High Court held that it would be unjust to estop the appellants from challenging the 8 October 1990 order by reference to res judicata or any other branch of the doctrine of estoppel because the 8 October 1990 order was plainly invalid, it being made in contravention of an express provision of written law. The appeal to the Court of Appeal (see [1996] 3 MLJ 621) was allowed on the sole ground that the High Court was functus officio and had no jurisdiction to set aside the 8 October 1990 order irrespective of any illegality in the order. That decision was reversed by the Federal Court. Three judgments were delivered by Their Lordships. But it was the judgment of Mohd Azmi FCJ (Eusoff Chin CJ, and Wan Adnan FCJ, as he then was, concurring) that was the

judgment of the Federal Court, where on the matter of inherent jurisdiction to set aside a final order, Mohd Azmi FCJ said as follows:

> It is of course settled law as laid down by the Federal Court in *Hock Hua Bank*'s case that one High Court cannot set aside a final order regularly obtained from another High Court of concurrent jurisdiction. But one special exception to this rule (which was not in issue and therefore not discussed in *Hock Hua Bank*) is where the final judgment of the High Court could be proved to be null and void on ground of illegality or lack of jurisdiction so as to bring the aggrieved party within the principle laid down by a number of authorities culminating in the Privy Council case of *Isaacs v Robertson* [1985] AC 97 where Lord Diplock while rejecting the legal aspect of voidness and voidability in the orders made by a court of unlimited jurisdiction, upheld the existence of a category of orders of the court '... which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court, without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity, and give to the judge a discretion as to the order he will make'.
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> The Privy Council through Lord Diplock also emphasised that the courts in England have not closed the door as to the type of defects in the final judgment of the court that can be brought into the category that attracts ex debito justitiae the right to have it set aside without going into the appeal procedure, 'save that specifically it includes orders that have been obtained in breach of rules of natural justice'. Similarly in this country, the statement of Abdoolcader J (as he then was) in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37 at p 39 provides the correct guideline on the subject:
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> The general rule is that where an order is a nullity, an appeal is somewhat useless as despite any decision on appeal, such an order can be successfully attacked in collateral proceedings; it can be disregarded and impeached in any proceedings, before any court or tribunal and whenever it is relied upon — in other words, it is subject to collateral attack. In collateral proceedings, the court may declare an act that purports to bind to be non-existent. In *Harkness v Bells' Asbestos and Engineering Ltd* [1967] 2 QB 729 Lord Diplock U (now a Law Lord) said (at p 736) that 'it has been long laid down that where an order is a nullity, the person whom the order purports to affect has the option either of ignoring it or of going to the court and asking for it to be set aside'.
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> For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to

enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

[17] In *Badiaddin*, the Federal Court settled that there is inherent and discretionary jurisdiction to set aside ex debito justitiae an order of court regularly obtained where there has been a breach of the rules of natural justice following the Privy Council case of *Isaacs v Robertson* [1984] 3 All ER 140; [1985] AC 97. However, the Federal Court cautioned 'that in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court ex debito justitiae to a category of cases involving orders which contravened 'any written law', the contravention should be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction'.

[18] The contravention must be one which defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of jurisdiction (in *MacQuire (Malaysia) Sdn Bhd v HSBC Bank Malaysia Bhd & Anor and another appeal* [2007] 7 MLJ 139, *Selvam Holdings (Malaysia) Sdn Bhd v Grant Kenyon & Eckhardt Sdn Bhd (BSN Commercial Bank Malaysia Bhd & Ors, Interveners)* [2003] 1 MLJ 251), and *Yee Seng Plantations Sdn Bhd v Kerajaan Negeri Terengganu & ors* [2000] 3 MLJ 699, the Court of Appeal applied *Badiaddin* per Mohd Azmi). In *Badiaddin*, the contravention defied a substantive statutory prohibition contained in the Malay Reservations Enactment. In *Meenakshi Naidoo v Subramaniya Sastri* LR 14 1A 160 (cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the High Court at Madras purported to entertain an appeal which was not appealable. And in *Chief Kofi Forfie v Barima Kwabena Seifah* [1958] 1 All ER 289; [1958] AC 59 (also cited by Gopal Sri Ram JCA, as he then was, in *Badiaddin*), the judgment was delivered when the presiding judge of the Chief Commissioner's Court had no power to exercise judicial functions. There must be 'a breach of the rules of natural justice or a contravention of a statute which is a sine qua non to invoke the very limited jurisdiction of a court to have its orders declared as void' (*Annie Quah Lay Nah v Syed Jafer Properties Sdn Bhd & Ors* [2007] 1 MLJ 225 per Gopal Sri Ram JCA). The order must be tainted by 'fraud or some other vitiating element and not a judgment that was merely irregular in the sense that it is one obtained in breach of a rule of court or of practice (*Chong Keat Realty Sdn Bhd v Ban Hin Lee Bank Bhd* [2003] 3 MLJ 321 per Gopal Sri Ram JCA). But in the instant case, all that could be said was that the appellant could have moved for summary judgment under the wrong order of court. That was not a contravention that defied a substantive statutory prohibition as to render the summary judgment null and void on ground of illegality or lack of jurisdiction. The jurisdiction under O 14 and O 81 might have been separate and distinct. But the court had jurisdiction to grant

summary judgment under O 14 or O 81. Summary judgment could have been granted under the wrong order of court. But that is not to say that there was no jurisdiction to grant the summary judgment. It was just that the jurisdiction to do so was under a different order of court. It could not be put into the category of contraventions that invite setting aside ex debito justitiae.

[19] Order 81 had no application. And in any event, there could not have been a contravention that invited setting aside ex debito justitiae. For those reasons, we were unanimous in our decision to allow this appeal and to restore the order dated 15 May 2000, when we heard this appeal on 9 September 2009. It was agreed at the onset that the outcome of this appeal would bind Appeal W-02–434 of 2007. That was accordingly so ordered.

Appeal allowed.

Reported by Kanesh Sundrum